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Summary record (partial)* of the 3243rd meeting**
Held at the Palais Wilson, Geneva, on Monday, 14 March 2016, at 10 a.m.

Chair: Mr. Salvioli

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** No summary records were issued for the 3240th to 3242nd meetings.

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The discussion covered in the summary record began at 10.05 a.m.

Organizational and other matters, including the adoption of the report of the pre-sessional Working Group on Individual Communications (*continued*)

Draft general comment No. 36 on article 6 of the Covenant (right to life) (CCPR/C/GC/R.36/Rev.3)

1. **The Chair**, noting that paragraphs 1 through 5 of general comment No. 36 had been adopted at the 115th session, invited the rapporteurs for the draft general comment to resume their introduction to the draft text.

Paragraph 6

2. **Mr. Shany** (Rapporteur for the draft general comment) said that paragraph 6 was designed to delineate the distinction between the right to life as enshrined in article 6 of the Covenant and certain related economic, social and cultural rights, including the right to health. In the final sentence, it was observed that article 6 might require States parties to address threats to life that did not result in a violation of the right to life.

3. **Mr. Politi** asked whether, in the first sentence, the word "infliction" was understood to exclude acts of omission or the failure to take life-saving measures and said that, if so, an alternative drafting solution should be found. He proposed that the words "injury that goes beyond mere damage to health", on whose meaning he sought clarification, might usefully be replaced with "injury that produces loss of life as a result of damage to health".

4. **Mr. Ben Achour**, referring to the French version of the draft text, said that, in the second sentence, the word "*visés*" was misleading and should be replaced with "*couverts*" or something similar. The words "*d'ordre général*" in the penultimate sentence and "*Cependant*" in the last sentence were, at best, unnecessary and should be removed.

5. **Mr. de Frouville** said that, in the first sentence, the reference to "a deliberate or otherwise foreseeable and preventable infliction" was inappropriate in that it evoked the notion of fault, which belonged to the realm of international criminal law. In the final sentence, "threats to life and life-threatening harms and injuries" seemed to be played down, as though they were of secondary importance compared to deprivation of life. He therefore proposed deleting the word "Still" and replacing "may require" with "requires". The word "situations" would be preferable to "harms" and, given that the Committee had provided examples of deprivations of life, it should also enumerate threats to life, such as enforced disappearance and non-lethal weapons, which were mentioned later in the draft text.

6. More generally, he had doubts as to the purpose of paragraph 6 which had been only partly allayed by Mr. Shany's introductory remarks. Drawing a distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, was difficult, especially in situations where actions or omissions by States led to a threat to life as a result of damage to health. In the penultimate sentence, the distinction that was made between deprivation of life and general threats or attacks against personal security was unclear and should be further explained.

7. **Mr. Fathalla** said that the concept of "foreseeable and preventable infliction of life-terminating harm or injury" should be treated separately from the deliberate deprivation of life. It should be exemplified by means of a non-exhaustive list that included not only actions but also omissions, such as the failure to protect citizens from pollution or epidemics. In the final sentence, he was not sure why the words "may require" had been chosen or whether and how injuries that did not result in loss of life could be considered to fall within the scope of article 6.

8. **Ms. Seibert-Fohr** said that a distinction should be drawn between the negative obligations of States, such as abstaining from carrying out the death penalty, and their positive obligations, such as preventing road-traffic deaths. By combining the two kinds of obligations in the same list, the Committee ran the risk of either expanding or reducing the duties imposed on States parties under article 6.

9. **Mr. Seetulsingh** said that, in the second sentence, the word "covered" should be used instead of "regulated". The penultimate sentence, which was slightly confusing, could be recast as follows: "Deprivation of life also represents a serious attack against the lives of individuals, rather than a general threat or attack directed against their personal security." He proposed that the final sentence should be redrafted to read: "Article 6 requires States parties to address threats to life and life-threatening harms and injuries that may result in loss of life." In so doing, the Committee would ensure that the content of the sentence remained within the scope of article 6.

10. **Mr. Rodríguez-Rescia** said that the paragraph as a whole should be simplified. He agreed with Mr. de Frouville that, in the first sentence, the notion of fault was evoked. He also concurred with Ms. Seibert-Fohr that a distinction should be drawn between States' positive and negative obligations. He proposed that the first sentence should be redrafted to include a reference to acts of omission attributable to the State and to remove any mention of the infliction of life-terminating harm or injury. In the second sentence, the list, while illustrative, was non-exhaustive and could open up a pointless debate on the legality or illegality of assisted suicide and euthanasia. He would therefore be in favour of deleting it.

11. **Mr. Iwasawa** said that he endorsed Mr. Seetulsingh's proposed rewording of the final sentence. In the first sentence, the reference to standard of living should be removed, as such concepts were not covered by the term "life" as understood within the context of article 6.

12. **Ms. Cleveland** said that she agreed with Ms. Seibert-Fohr on the need to distinguish between positive and negative obligations and felt that Mr. Seetulsingh's proposal for the final sentence went some way towards achieving that objective. In the second sentence, the reference to assisted suicide, euthanasia and infanticide should be deleted, partly to avoid opening up a debate and partly because there were many other more pertinent examples.

13. **Mr. Bouzid** asked whether States should also bear responsibility for preventable deaths resulting from widespread famine or from epidemics.

14. **Mr. Vardzelashvili** said that he supported the proposals to distinguish between positive and negative obligations and to enumerate threats to life, possibly with reference to specific cases.

15. **Mr. Shany** said that some of the concerns raised by other Committee members, including those related to providing examples of positive obligations, were addressed in subsequent paragraphs of the draft text.

16. There were two schools of thought with regard to the distinction between deprivation of life and the duty to protect life. His own view was that deprivation of life entailed an infliction of harm either by the State or by a non-State actor and that States were required to protect their citizens from non-State actors and from situations such as famine. The term "deprivation" could, however, be interpreted as having a broader meaning.

17. In the first sentence, the intention had been to evoke the notion of State responsibility rather than that of fault in the criminal law sense. States were not being required to protect against harms that were not deliberate, foreseeable or preventable. In the final sentence, the word "may" had been used because the requirement to address threats to life was a positive obligation of States parties and, because of that fact, States parties might not be responsible under international law for failing to address certain types of threats.

18. The aim of distinguishing between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, had been to emphasize that not every violation of the right to health, for example, would automatically constitute a violation of the right to life. That did not mean, however, that the two groups of rights did not overlap to a significant degree.

19. **Sir Nigel Rodley** (Rapporteur for the draft general comment) said that, as arbitrary deprivation of life was the most central and important aspect of article 6, he would find it difficult to accept any suggestion that some kind of equal balance should be struck between deprivation of life and protection of life. That having been said, it might be helpful to draw a clearer distinction between the positive and negative obligations of States.

20. **Mr. Politi** said that, if the Committee decided to refer to acts of omission by States, it should consider including as an example thereof the denial of life-sustaining goods and services, such as food, water, sanitation and shelter. He endorsed Mr. Seetulsingh's proposal regarding the penultimate sentence. In the last sentence, consideration should perhaps be given to clarifying what was meant in practical terms by the verb "address".

21. **Mr. Ben Achour** said that he would appreciate it if Mr. de Frouville could elaborate on the distinction that he had made between acts that came under international criminal law and those that fell under international human rights law. As to the need to distinguish between the positive and negative obligations of States, it should be borne in mind that there were already several references to those concepts in various subsequent paragraphs.

22. **Mr. de Frouville** said that the paragraph gave rise to a certain amount of confusion because it was not clear whether it addressed obligations of States or factual situations covered by article 6. If acts or omissions likely to engage the international responsibility of States were discussed, then language that referred to fault or to an intention to cause harm should be avoided. As to the balance between the deprivation of life and the protection of life, it was important to recall that in 1982 the Committee had stated in its general comment No. 6 that the right to life could not properly be understood in a restrictive manner and that the protection of that right required that States should adopt positive measures, including measures to reduce infant mortality and to increase life expectancy. It therefore did not seem that protection could be considered to be a subsidiary matter.

23. **The Chair** said that any examples of deprivation of life that might be cited should be consistent with issues raised by the Committee in its concluding observations. As to the question of referring to economic, social and cultural rights, he noted that, regrettably, the Committee, unlike other treaty bodies, had never indicated in a general comment that human rights were indivisible and interdependent. It should ensure, however, that it respected that interrelationship in the draft general comment under consideration.

Paragraph 7

24. **Sir Nigel Rodley** said that, although the overwhelming majority of enforced disappearances resulted in deprivation of life, the language of the paragraph was so formulated as not to imply that they necessarily did so.

25. **Mr. Shany** said that paragraph 7, together with paragraphs 8, 9 and 10, dealt with questions that related to the scope of article 6 and to the relevance of the latter to a number of issues that had been raised recurrently before the Committee.

26. **Mr. Ben Achour**, noting that the rapporteurs had not used the adjective "enforced" to qualify the noun "disappearance", asked whether that had been a deliberate omission on their part.

27. **Mr. de Frouville** said that, in the first sentence, the phrase "intended to remove an individual from the protection of the law" introduced an element of intention into the act of

enforced disappearance, which, for the reasons that he had set out earlier, was undesirable. Furthermore, it might give the impression that the Committee was seeking to define enforced disappearance rather than describe it in terms of obligations deriving from the Covenant. Accordingly, it would be better to adhere strictly to the entirely satisfactory wording used by the Committee in its jurisprudence, for example in *Katwal v. Nepal*, where it had stated that enforced disappearance constituted a unique and integrated series of acts that represented continuing violation of various rights recognized in the Covenant. On several occasions in its jurisprudence the Committee had explicitly stated that enforced disappearance violated the right to life, inasmuch as it placed the life of the disappeared person at a serious and constant risk.

28. The Committee might consider including a number of other issues in paragraph 7 that had been addressed in its concluding observations and communications. For example, reference might be made to the requirement imposed by some States on family members to apply for a death certificate, which was contrary to not only article 7, as the Committee had recognized, but also article 6, given that the Committee had consistently indicated that a finding of a violation of article 6 in cases involving enforced disappearance did not amount to a finding that the disappeared person was dead. States could perhaps be encouraged to establish a mechanism that would allow family members of a disappeared person to obtain a declaration of presumption of death with a view to resolving a number of legal matters during that person's absence.

29. **Mr. Rodríguez-Rescia** said that it was essential that the adjective "enforced" should be used systematically to qualify the word "disappearance". In line with the Committee's recent jurisprudence, it should be made much clearer that enforced disappearance involved violations of various rights recognized by the Covenant. In his view, the removal of an individual from the protection of the law was not the intended purpose of the act of enforced disappearance but rather a consequence thereof. In the second sentence, the words "prohibit and" should be inserted before "prevent". Furthermore, mention should be made of the need to establish expeditious, effective procedures not only to investigate cases of enforced disappearance but also — and more importantly — to ensure the appearance of the disappeared person alive. In that connection, reference could be made to, for example, mechanisms such as habeas corpus and *amparo*.

30. **Mr. Fathalla** said that he endorsed the comments made by other speakers about the need to refer to "enforced disappearance" rather than simply "disappearance". Although he was not opposed to the issue of enforced disappearance being linked to article 6 of the Covenant, the focus of the discussion should be on the threat to life, not the right to life more generally, since an act of enforced disappearance did not always entail deprivation of life.

31. **Mr. Politi** said that it might be recalled that, during a previous discussion on the draft general comment, he had proposed that the paragraph on enforced disappearance should be placed elsewhere in the document, for example together with paragraphs 22, 25 or 60. Although he did not wish to insist on the matter, the rapporteurs might like to give consideration to that proposal. As to the first sentence, he suggested redrafting it along the following lines: "Disappearances constitute a unique and integral series of acts and omissions aimed at removing an individual from the protection of the law and result in a flagrant violation of the right to life and constitute a grave threat thereto." Consideration should be given to including references to investigative procedures other than those aimed at minimizing the adverse effects on the right to life of enforced disappearance. For example, reference could also be made to ascertaining the fate of the disappeared person, bringing the perpetrators to justice and providing reparations to victims of the crime.

32. **Ms. Cleveland** said that she endorsed Mr. Politi's comment about relocating the paragraph in order to place it alongside other paragraphs that dealt with similar issues. She

would also like to see a more fully developed treatment of the Committee's jurisprudence on enforced disappearance in the general comment.

33. **Sir Nigel Rodley** said that he agreed with Ms. Cleveland and Mr. Politi: paragraph 7 belonged more naturally in the chapter relating to the relationship between article 6 of the Covenant and other rights; doing so would resolve the point raised by Mr. Fathalla, as well. The rapporteurs would try to reach a decision on the relocation of the paragraph before the end of the session. The omission of the word "enforced" was purely an oversight. The rapporteurs had no intention of changing the Committee's jurisprudence.

34. He agreed that it was important to include a reference to habeas corpus or *amparo*, as the Committee had done in general comment No. 35. At the same time, it was important to remember that the draft general comment did not concern only enforced disappearance but the right to life generally. It was difficult to get the balance right and include all the points raised by members of the Committee. Lastly, with regard to Mr. de Frouville's reference to the possibility of inviting States parties to issue a declaration of presumption of death, he had to say that he strongly opposed such an approach. He recalled the period during which the Argentine junta had done precisely that, and the families of the victims had found the measure intolerable, as they were not prepared to presume the death of their loved ones nor to permit the State to do so.

35. **The Chair** said that some countries issued a certificate of "absence due to enforced disappearance" rather than a death certificate. Such action allowed families to deal with the civil matters that arose.

36. **Mr. de Frouville** said that Sir Nigel had misunderstood his comment: he had sought to draw a distinction between a death certificate and the presumption of death certificate issued in some countries that did not have a certificate of "absence due to enforced disappearance" in order to allow victims' families to deal with such issues as childcare or the management of assets. If such a certificate were not issued, in some cases the family would be forced to request a death certificate. Moreover, presumption of death was the approach recommended for resolving that problem by the International Committee of the Red Cross in its Model Law on Missing Persons and by the Working Group on Enforced or Involuntary Disappearances.

37. Mr. Politi's suggestion to soften the use of the word "intended" did not go far enough: the definition of enforced disappearance set out in the Rome Statute of the International Criminal Court had been criticized precisely because it referred to intent. That element hindered prosecutors' work because in some cases it was almost impossible to prove intent. Moreover, neither international human rights law in general nor the Committee's jurisprudence focused on intent. He would therefore be in favour of removing the reference to intent altogether.

38. **Mr. Fathalla** said that the focus of the paragraph should be on threats to the right to life. He therefore suggested that the phrase "resulting in a flagrant violation of the right to life" should be replaced by wording such as "constituting a threat to life and therefore a violation of the right to life".

39. **The Chair** said that he had made a similar suggestion. He was confident that the rapporteurs would take those views into account.

Paragraph 8

40. **Mr. Shany** said that, like paragraph 7, paragraph 8 dealt with a specific issue and might usefully be relocated in another part of the general comment. In formulating the text, the rapporteurs had consulted communications and concluding observations and had held discussions with the Committee on the Elimination of Discrimination against Women.

Clearly, there were doubts as to whether article 6 related to the life of a fetus or only to the life of the mother. It was a complex issue but the Committee was right to be discussing it.

41. **Mr. Seetulsingh** said that he welcomed Mr. Shany's proposal to move the paragraph to a later part of the draft general comment. Indeed, the Committee should do so at once, as otherwise it would embark on a lengthy discussion prematurely. It was true that the Covenant did not specifically refer to preserving the life of a fetus, but in the *travaux preparatoires* of the Covenant, a principal reason that had been cited for not carrying out an abortion was to save the life of an unborn child. The use of the word "still" at the beginning of the third sentence might give rise to controversy, given that the focus of the paragraph was on the life of the mother. The paragraph would be better placed in part III of the draft, on the duty to protect life. In national abortion laws, it was recognized that life began to exist at a certain point, with prohibitions on abortion being set at 10, 12 or 14 weeks of pregnancy. Although there was no explicit reference to the right to life of a fetus, it was implicit in article 6 (5).

42. **Ms. Seibert-Fohr** said that the first two sentences of the paragraph were not persuasive in terms of either their reasoning or substance. No conclusion could be drawn from the different wording of the American Convention on Human Rights. The issue as to whether or not article 6 of the Covenant applied to an unborn child was extremely controversial, and other human rights bodies, such as the European Court of Human Rights, had left the issue open. That option was also available to the Committee. She wondered what the purpose of a negative statement in that respect would be, in any case. The purpose of the draft general comment was to protect life to the greatest degree possible, not to elaborate on limits to the protection of that right. She recalled that the Convention on the Rights of the Child explicitly recognized the special need for protection of a child before birth. How, then, could the Committee possibly claim that article 6 of the Covenant did not do so?

43. She did not find any reference in the draft paragraph to the need for States to eliminate the use of abortion as a method of contraception by ensuring the provision of affordable contraception and providing reproductive and sexual health education in schools. The first two sentences should therefore be deleted. If the question of whether an unborn child was entitled to the right to life was to be left open, the Committee should at least recognize that it was legitimate for a State to protect the life of the fetus, as established in the case of *A, B and C v. Ireland* heard by the European Court of Human Rights.

44. Other changes would be needed, however, in addition to the deletion of the first two sentences, since the rest of the paragraph was clearly based on the fact that the first two sentences implied that a fetus did not enjoy the right to life. One example was the sentence in which, essentially, States were urged to decriminalize abortion, irrespective of whether a woman's life or health were at risk, whether she had been a victim of rape or incest or whether there was a fatal fetal abnormality. Moreover, the wording of the paragraph was imprecise and too comprehensive. She wondered what "excessively burdensome" or "humiliating" requirements entailed and what mandatory waiting period would be regarded as "lengthy". She could not see how such issues were linked to the protection of the right to life. She agreed with Mr. Seetulsingh that the entire paragraph should be redrafted so as to focus on the right to life.

45. **Ms. Cleveland** said that, ever since the Committee had begun to address the implications of article 6 of the Covenant in relation to the issue of abortion, it had consistently applied the right to life in the context of protecting the life of the woman concerned. The Committee had never engaged in a "balancing act" between the interests of the fetus and the right to life of the woman. It had also dwelt on the risk that the criminalization of abortion posed to women by obliging them to resort to unsafe abortions. Such abortions were the third most common cause of maternal mortality around the world.

46. Thus, the reason that the draft text of paragraph 8 focused on the limitations imposed by States was because those limitations put the lives of women at risk. She could not agree with Mr. Seetulsingh that the negotiating history of article 6 (5) bestowed free-standing protection upon a fetus. Rather, it recognized the interests of a pregnant woman who had a wanted pregnancy and protected her autonomy in that context. She supported the general approach of the draft paragraph, but she would prefer to remove the reference to the American Convention. Equally, the draft general comment should not refer to the Convention on the Rights of the Child, which was an entirely different instrument.

47. **Mr. de Frouville** said that he agreed with Mr. Seetulsingh's suggestion about moving the paragraph: it would be better to place it in chapter III and give the Committee further time to discuss it. However, the Committee should not take up the scope of the application of article 6 of the Covenant; it had never done so in the past but had instead consistently applied it only to maternal mortality. In that connection, research showed that, where abortion was prohibited, the mortality rate soared, whereas liberalization led to a drop in mortality rates. The fact was that 22 million abortions took place under risky conditions every year and 47,000 women died. The issue was not one of simply allowing access to abortion under specific conditions, such as rape, incest or fatal fetal abnormality. Recent debates in various countries had made it clear that allowing abortion only in those cases actually reduced the number of clandestine abortions very little. The Committee should also take into account the implications of the Zika epidemic, which resulted not in death but in the birth of babies who suffered a short and difficult life.

48. At the same time, there should be no implication that the Committee advocated the use of abortion as a form of contraception. On the contrary, the Committee had frequently spoken out against such unacceptable practices as sex selection. In the general comment, the Committee should urge States parties to decriminalize abortion but at the same time to take preventive measures, such as education, family planning and improved genetic health-care services. It should not stray into areas not covered by its jurisprudence.

49. **Mr. Fathalla** said that he agreed with Ms. Seibert-Fohr and Mr. Seetulsingh. The aim of general comments was to further the interpretation of the Covenant, and the Committee should therefore take into account all the scientific and other developments that had occurred in the 50 years since its adoption. When speaking about the right to life, one important question was when life started. The draft should therefore focus on the need for women to be aware of the risks posed by clandestine abortions and to use contraception to avoid unwanted pregnancies. The example of South Africa showed that prevention from the outset was the best policy.

50. **Mr. Shany** said that the rapporteurs would be grateful for specific drafting formulations. He did not agree with Mr. Seetulsingh's suggestion that the discussion of the draft paragraph should be deferred, thus forcing the Committee to revert to the issue a year or two later.

51. **Sir Nigel Rodley** said that he would be in favour of relocating the paragraph, but its new location would have to be decided upon. It could go in the final chapter, which dealt with the relationship between the right to life and other human rights; mention had been made in that connection of articles 17 and 19, while article 7 was also particularly apposite in that regard.

The meeting rose at 12.15 p.m.